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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1125 87

JULIAN BOND, DR. MARTIN LUTHER KING, JR., and MRS. AREL KEYES,

Appellants,

—v.—

JAMES "SLOPPY" FLOYD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, *AMICI CURIAE*

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Interest of *Amici*

The American Civil Liberties Union and the American Civil Liberties Union of Georgia, which file this brief with the consent of the parties, believe that the case at bar raises substantial federal questions under the First Amendment which should be heard and decided by this Court. The central question is whether a duly elected representative to a state legislature may be barred from taking his seat solely because his views on issues of public importance are incompatible with the views held by a majority of the legislature.

For the reasons set forth in this brief, we believe the Court should note jurisdiction so that that question, among others, may be fully briefed, argued and decided.

The Questions Are Substantial

(1) ART. III, SEC. IV, PARA. 5, AND ART. III, SEC. VII, PARA. 1 OF THE GEORGIA CONSTITUTION ON THEIR FACE AND AS CONSTRUED AND APPLIED IN THIS CASE VIOLATE APPELLANTS' RIGHTS OF FREE SPEECH AND ASSOCIATION AS GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The three members of the court below were agreed that the case before them raised substantial federal questions (App. pp. 26, 66).[1] Likewise there was no dispute that the court had the power to decide the issue on the merits, notwithstanding the vigorous claims by the defendants below that "the subject matter is one which is vested within the exclusive jurisdiction of the House" (Defendants' Brief in Support of Motion to Dismiss, p. 7 et seq.), and that the complaint did not present a justiciable issue (*Id.* at p. 20 et seq.). As the majority opinion put it, "The court has jurisdiction over a denial of First Amendment rights by the state, and . . . the federal rights asserted here are not so insubstantial as to warrant our refusing jurisdiction" (App. pp. 25-26).

Having assumed jurisdiction, the court below proceeded to the merits and decided the case on the basis of a novel theory of the First Amendment which has no precedent in this Court, and which if left standing will seriously erode

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[1] The reference "App." is to the opinions below as contained in the Appendix of the Appellant's jurisdictional statement.

at least two fundamental constitutional principles which are directly served by the First Amendment: freedom of elected representatives to express themselves without hindrance on questions of public importance, and the right of voters freely to elect their legislative representatives. To nullify either of these rights makes a mockery of representative democracy. Nonetheless, both of these principles were emasculated by the decision of the court below.

The first premise of the novel theory adopted below is that "the free speech issue should be resolved in the context of giving effect to the separation of powers principle, and also our system of federalism to the extent that it permits self-government to the states under the supremacy of the Federal Constitution" (App. pp. 34-35). Drawing then upon *Barry* v. *United States*, 279 U. S. 597 (1929) and *Snowden* v. *Hughes*, 321 U. S. 1 (1944), the court derived the further premise that judicial interference in the electoral process is confined to those cases where the alleged wrong is clearly arbitrary in the due process sense, or purposefully and invidiously discriminatory in the equal protection sense (App. pp. 35-37). From these two premises the court concluded that "some restraint is to be practiced by the courts in considering state political questions concerning particular offices as distinguished from whole systems such as are prevalent in malapportionment, or racial discrimination. If this premise be correct, then there is room for a balance between the separation of powers principle, a system of federalism and individual rights afforded under the federal Constitution" (App. p. 37).

Having taken the balancing theory[2] into these uncharted wilds, the court then imported a second distinct theory

[2] *Barenblatt* v. *United States*, 360 U. S. 109 (1959), *Wilkinson* v. *United States*, 365 U. S. 399 (1961), and *Braden* v. *United States*, 365 U. S. 431 (1961).

enunciated by this Court in *Thompson* v. *Louisville*, 362 U. S. 199 (1960), and concluded that the denial of Bond's seat is justified if there is "any evidence which would support the denial" (App. p. 37).

Searching the record for "any evidence", the court finds two sorts. First, the SNCC statement is not merely "at war with the national policy of this country," it is also "a call to action based on race" (App. p. 38).[3] Second, the call to action is in "language which states that SNCC supports those men in this country who are unwilling to respond to a military draft" (*Ibid.*). Consequently, the court concluded, "We find and hold that [Bond's] statements and affirmation of the SNCC statement as they bore on the functioning of the Selective Service System could reasonably be said to be inconsistent with and repugnant to the oath which he was required to take. This suffices as a rational basis for the action of the House" (App. p. 40).

The upshot of the court's analysis is the transformation of the balancing test which, as enunciated by this Court, requires that the states have a "compelling and subordinating . . . interest"[4] in order to infringe First Amendment rights, into a test which allows those rights to be traduced

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[3] But see *Garner* v. *Louisiana*, 368 U. S. 157 (1961); *Taylor* v. *Louisiana*, 370 U. S. 154 (1962); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Fields* v. *South Carolina*, 372 U. S. 522 (1963); *Peterson* v. *City of Greenville*, 373 U. S. 244 (1963); *Lombard* v. *Louisiana*, 373 U. S. 267 (1963); *Shuttlesworth* v. *Alabama*, 373 U. S. 262 (1963); *Wright* v. *Georgia*, 373 U. S. 284 (1963); *Barr* v. *City of Columbia*, 378 U. S. 146 (1964); *Bouie* v. *South Carolina*, 378 U. S. 347 (1964); *Cox* v. *Louisiana*, 379 U. S. 536 (1965).

[4] *Gibson* v. *Florida*, 372 U. S. 539, 555 (1963).

so long as the state demonstrates no more than "a rational basis" for its action.

In fact, no "rational basis" was demonstrated. Needless to say, neither was there a compelling state interest or a clear and present danger. Under none of these tests could the appellant have been properly penalized for his statements. The SNCC statement, though no doubt provocative, was the apotheosis of free political comment. It did nothing more than express sympathy and support for those who object to being drafted, and encouraged work in the civil rights movement as "a valid alternative to the draft."[5] And Mr. Bond's remark about the "courage" of those persons who burn draft cards is hardly evidence of unfitness.

The issue this Court must decide in this case is whether an individual elected by the people to represent them in a state legislature may be cast out by the legislature because it finds his views too unorthodox for its taste.[6] For that reason, this case must be fully briefed and argued so that the nation can once again be instructed that transgressions upon the right of unfettered speech will not be tolerated.

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[5] The Selective Service Act specifically allows alternative civilian service for conscientious objectors. 50 App. U. S. C. Sec. 456(j).

[6] The special importance of unrestricted speech and the open clash of ideas within legislatures is reflected in Art. I, Sec. 6 of the United States Constitution which provides that . . . "for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place." See *U. S.* v. *Johnson*, 34 U. S. L. Week 4161 (Feb. 24, 1966).

(2) ART. III, SEC. IV, PARA. 5, AND ART. III, SEC. VII, PARA. 1 OF THE GEORGIA CONSTITUTION ARE IMPERMISSIBLY VAGUE BECAUSE THEY DO NOT INFORM EITHER A LEGISLATIVE ASPIRANT, OR THOSE WHO ELECTED HIM, OF CONDUCT WHICH RUNS AFOUL OF THEIR PROVISIONS.

Under the terms of the Georgia constitutional provisions, as construed and applied below, a conscientious person who aspires to be a legislator must play a type of Russian roulette. He must speculate about the controversiality of his every statement and the intentions of his fellow legislators. If he guesses wrong he loses his political life. Consequently, as in *Baggett* v. *Bullitt,* 377 U. S. 360, 372 (1964):

> "We cannot say that this oath provides an ascertainable standard of conduct or that it does not require more than a State may command under the guarantees of the First and Fourteenth Amendments."

When First Amendment rights are at stake, the void-for-vagueness doctrine has special application. The effect of the Georgia oath's uncertain requirements, as exemplified in this case, is to seriously inhibit free and frank discussion of public issues by candidates and elected representatives. Aspirants for public office can, if elected, be assured of being seated only "by restricting their conduct to that which is unquestionably safe." *Baggett* v. *Bullitt, supra,* at p. 372.

We have no constitutional quarrel with that portion of the Georgia oath which calls for "support" of the United States and Georgia Constitutions. Rather, it is the succeeding language which is objectionable: ". . . and on all questions and measures which may come before me, I will

so conduct myself, as will, in my judgment, be most conducive to the interest and prosperity of this state."

This case provides tangible proof that the language claimed to be vague not only permits but encourages rummaging around in a grab bag of charges and accusations so that appellant Bond has no actual idea of the conduct which supported the Legislature's conclusion that he was incapable of taking the oath of office.

Thus, the petitions filed against Bond in the House of Representatives charged among other things that he did not support the Constitutions of the United States or Georgia, that he had committed treason, that he had violated the penal provisions of the Selective Service Act, that he had brought discredit to the Georgia House of Representatives (App. pp. 46-47), and that he had endorsed a "subversive policy statement" (App. p. 52).

Counsel for the Special Committee charged that appellant had committed treason (T. 68),[7] and had given aid and comfort to the enemy (T. 81-82).

The Special Committee's report contained no reasons for its recommendation (T. 91).

Initially, the Attorney General of Georgia, attorney for the defendants below, though declining to make any "contentions whatsoever with respect to Mr. Bond's right to make the statements attributed to him," said at the same time that those statements "were sufficient to put the House

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[7] The symbol "T" refers to the transcript of the proceedings before the Georgia House of Representatives which is part of the record on appeal.

on notice that possibly he did not feel bound to support the Constitution of the United States" (Defendant's Brief in Support of Motion to Dismiss, p. 31). A few days later, the Attorney General thought that Bond was disloyal to the United States (Defendant's Supplemental Brief, p. 5), had advocated violation of the Selective Service Act (*Id.* at pp. 5-6), and had committed sedition (*Id.* at p. 17).

The majority opinion below held that appellant's statements "as they bore on the functioning of the Selective Service System could reasonably be said to be inconsistent with and repugnant to the oath which he was required to take" (App. p. 40).

Any statute which will support such variegated charges without any agreement about which of appellant's statements supports the Legislature's conclusion, is, we believe, *ipso facto* void for vagueness.[8]

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[8] *Amici* also believe that the decision below in effect disenfranchised Mr. Bond's constituents in violation of the Fourteenth Amendment, and that House Resolution 19 is both an Ex Post Facto Law and Bill of Attainder in violation of Article I, Section 10 of the United States Constitution. We forego treating these questions since they are sufficiently dealt with in appellant's jurisdictional statement.

CONCLUSION

For the reasons stated above, the questions are substantial and the Court should note probable jurisdiction. Under the circumstances of the case, we also urge the Court to grant appellant's Motion to Advance.

Respectfully submitted,

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